In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 214

GILCREASE OIL COMPANY,

Petitioner,

v.

G. M. COSBY *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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To the Supreme Court of the United States and the Honorable Judges Thereof:

The petitioner, Gilcrease Oil Company, respectfully prays this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons hereinafter set out.

JUDGMENT BELOW

The judgment sought to be reviewed was entered January 20, 1943, and appears at page 529 of the Record.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, plaintiff in the trial court, sought to recover from respondents 7/8ths of the minerals under a strip of land 48 feet on the east, 41 feet on the west and 1,798 feet from east to west, containing approximately two acres, the suit being a Texas trespass to try title suit to fix boundary.

There were two original surveys, the Hathaway on the north and the Castleberry adjoining on the south, the southeast corner of the Hathaway being the northeast corner of the Castleberry, and the south boundary line of the Hathaway being the north boundary line of the Castleberry. Arthur Christian owned a tract of approximately 100 acres which occupied the east end of the Hathaway Survey. One Thad Snoddy owned a tract of 50 acres in the northeast corner of the Castleberry Survey. Arthur Christian conveyed 7/8ths of the minerals within and under his tract by an instrument which after reciting field notes calling for original survey lines contains the following additional description:

> "This being the same land deeded to us by J. M. Farmer et ux. by deed recorded in Vol. 38, page 189 of the Deed Records of Gregg County, except 3 acres sold to the Colored School and church there being 100 acres of land, more or less, in said tract purchased from J. M. Farmer but in a recent survey, there was found to be 107 acres of land, more or less.
>
> "It is intended herein to convey in this lease all the land we own in the above survey save and except 25 acres sold off of the N. W. corner of Earl Christian, deed recorded in Gregg County Records. It being the

> intention to include all land owned or claimed by Lessor in said survey or surveys. * * * (R. 524.)

Petitioner came into possession of the southeast 31 acres by mesne conveyance under Arthur Christian on which it drilled 11 producing oil wells.

There was pointed out to petitioner at the time it purchased as the south boundary line of the Arthur Christian tract an old hedge row fence, which petitioner always considered as its south line, no other boundary line being visible and any other fence having been removed at the beginning of the East Texas oil boom before petitioner purchased its tract (R. 177-178) and which is the line contended for by petitioner as the south line of its tract. (R. 2.)

About five years after the execution of the conveyance under which petitioner holds, one Beavers, a surveyor, purported to resurvey the line between the Hathaway and Cattleberry Surveys. He contended that the line as he found it ran north of the old hedge row fence at such distance as to cut off the strip sued for by petitioner. (R. 525.) On that assumption, five years after the date of petitioner's lease, he obtained a lease from the same Arthur Christian under which petitioner holds, which is the lease under which respondents now hold, and which lease (R. 525) gives as its south line the following description:

> "Thence following *a fence on the North line of Thad Snoddy 50-acre tract*, as follows, 88° 07′ E. 274 feet; S. 87° 43′ E. 400 feet; East 500 feet; N. 81° 58′ E. 128.3 feet; East 473 feet, to a stake the southeast corner of this tract; * * *" (Italics ours.)

which description when fitted to the ground is found to be the old hedge row fence (R. 82, 100) and is the line con-

tended for by petitioner as the south line of its tract. (R. 2.) Respondents later obtained quit-claims under Thad Snoddy, using the same field notes describing the Thad Snoddy north line as being the same fence. (R. 367.)

Thus all of respondents' title papers under Christian, as well as under Snoddy, described the north line of the Snoddy tract, which was the south line of the Christian, as contended for by petitioner (R. 2) which was the old hedge row fence.

Respondents then applied to the State Railroad Commission for, and obtained, permits to drill three wells on the narrow strip. Petitioner, among the 11 wells on its land, drilled three of them offsetting the three wells drilled by respondents. Petitioner did not appear before the Railroad Commission to set up its title but elected to assert its title in court, thus the beginning of this suit.

Respondents' pleadings also pleaded the same line between the Christian and Snoddy tracts (R. 23), which when fitted to the ground is found to be the old hedge row fence, which petitioner claims as the south boundary of its lease. (R. 2.)

Respondents claimed under both the Arthur Christian title and the Snoddy quit-claims. The lower court found both. (R. 504-6.)

The land involved is in the heart of the East Texas Oil Field, and producing wells were thickly drilled in every direction when respondents "discovered" this strip and sought to drill oil wells on it. Respondents' knowledge of the title and conditions was at least equal, if not superior, to petitioners. (R. 297-311.)

Petitioner submits that the above are the controlling facts. Thus the decision becomes a question of law and not a question of fact allowing the strip to be located otherwise than described in all of the instruments under which respondents hold, as well as their pleadings, all of which describe the same line as contended for by petitioner. (R. 2.)

An oil lease under the Texas law after production is proved, is a conveyance, hence the word "conveyance" is used interchangeably for the word "lease." The mineral estate it conveys is "land" and not personal property. Hence, we have herein used the words "lease", "conveyance", and "deed" interchangeably.

At the trial in the court below respondents admitted that the Beavers' line (which is the line called for in petitioner's complaint as the north line of the strip, R. 3) was too far north and contended (R. 214), and the court found, that it was a line supposed to mark the position of a fence torn down since the oil boom in East Texas and which former fence line intersected the west boundary of the strip about ten feet from its northwest corner and ran along slightly north of the three wells drilled by respondents and extended to the southeast corner of the strip. (R. 214.) Thus leaving outside of the land claimed by respondents but within the strip sued for by petitioner a tract containing something more than one-half of the strip sued for, being 10 feet wide on the west, 48 feet wide on the east and lying along the entire length of the strip sued for. The line so claimed by respondents as found by the court being described in the lower court's Finding of Fact No. 12 (R. 509) being:

"Begin at a 19" Sweet gum marked 'X' on N. & W. faces (pt. 'A' on Exhibit), Thence with Arthur Christian's old fence line, N. 89 deg. W. at 730 ft. pass 10.8 ft. North of oil well No. A-2 Cosby & Croley, at 789 ft. a 25" Sweet gum three old hacks on N. face and old wire in N. face, N. 89 deg. 40 W. 500 ft. to point in old fence line, N. 87 deg. 09 W. at 106 ft. pass 14 ft. N. of oil well No. 1 Cosby & Croley, at 383 ft. pass 26.2 ft. N. of oil well No. 3 Cosby & Croley, at 502 ft. point at S. E. C. Pine Hill Christian Church tract (as fenced, 1931) said point being S. 89 deg. 45' E. 5123 ft. and S. 89 deg. 33 E. 178.9 ft. from large standing Red Oak at corner of Bass to Rucker."

The lower court then found in its Conclusion of Law No. 2 (R. 511), that petitioner (plaintiff in the court below) had satisfied the burden of proof with reference to the land north of said line, the court continuing as follows:

"* * * but that plaintiff (petitioner) has satisfied the burden of proof and is entitled to the oil and gas mineral lease estate in and under and pertaining to the land North of said fence line herein described upon which none of the wells drilled by defendants (respondents) are situated." (R. 511.)

Notwithstanding, the lower court rendered judgment (R. 513) that petitioner "take nothing * * * and said defendants (respondents) and each of them go hence without day, fully, finally and forever acquitted of all claims of plaintiff (petitioner.)

Under Appendix is attached a map or plat for the convenience of the court illustrating the controlling facts as briefly stated herein.

QUESTIONS PRESENTED

Briefly stated, the questions herein presented are these:

(1) Whether or not under local Texas rules, when respondents claim under a deed from petitioner's grantor describing the south boundary of grantor's tract of land as contended for by petitioner when coupled with quit-claims from the owner of the adjoining tract containing recitals calling for the same line as the boundary of the adjoining tract, such recitals are available to petitioner to prove boundary of its tract.

(2) Whether or not petitioner is estopped under the Texas rule to claim its land because it elected not to appear and set up title before the State Railroad Commission when respondents applied for permits, the petitioner having drilled some of its wells on the remainder of its land as offsets to the wells drilled by respondents, and later instituted suit in Federal District Court for title and possession of its land, respondents having at least equal, if not superior, knowledge of the title.

(3) Whether or not when petitioner sues for a tract of land and respondent only claims half of the land sued for and the trial court finds that petitioner has established by a preponderance of the evidence its right to title and possession of half, judgment can be rendered against petitioner for the whole tract, including the half to which petitioner has proved right to title and possession.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Petitioner urges three reasons for the granting of the petition in this case, the first two being upon the ground

that the Circuit Court of Appeals has decided important questions of local law in conflict with applicable local Texas decisions and, third, that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and/or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision.

(1) The decision of the Circuit Court of Appeals in the instant case holding that under the Texas rule recitals in deeds from petitioner's grantor describing the boundary line between the Christian and Snoddy tract as contended for by petitioner when coupled with recitals in the quit-claim from the owner of the adjoining tract also describing the boundary between the two tracts as contended for by petitioner are unavailable to petitioner to prove the boundary of its tract is in conflict with the decision of the Supreme Court of the State of Texas in the case of *McBride et al. v. Loomis* (Tex. Sup.), 212 S W. 480.

This is a question of great and far-reaching importance. When cheap land suddenly becomes of great value, the boundaries are the subject of frequent litigation and the recitals in the deeds become very important in settling such litigation. Before litigation is actually instituted, the parties do not know on what question the title will turn and the recitals in the deeds are likely to speak the truth. The question of whether or not they estop those making them and their privies is of great importance. To illustrate the frequency of such litigation, this is the third time this land has been before the Federal Court attempting to take a strip off this same Arthur Christian lease, under which petitioner holds. The decisions in the other two cases are

Ballard v. Stanolind Oil & Gas Company (5th Cir.), 80 F. (2d) 588, and *Doyle et al. v. Stanolind Oil & Gas Company et al.* (5th Cir.), 123 F. (2d) 900; opinion in District Court in same case, 30 Fed. Supp. 893.

(2) The decision of the Circuit Court of Appeals in the instant case holding that petitioner is estopped to claim its land, respondents having equal, if not superior, knowledge of the title, because it did not appear and set up its title before the State Railroad Commission when respondents applied for permit and having drilled three of its eleven wells as offsets to the three wells drilled by appellants on the strip and elected to try out its title in court which is the origin of this suit, is in conflict with the recent decision of the Supreme Court of the State of Texas, in *Magnolia Petroleum Company v. Railroad Commission of Texas et al.* (Sup. Ct.), 170 S. W. (2) 189, decided March 31, 1943, which holds that the State Raliroad Commission has control of the administration of the Texas Oil Conservation laws only and has nothing whatever to do with titles and that evidence bearing on whether or not title was set up before the Railroad Commission is inadmissible in a subsequent suit for title.

This is an important question of local law and a question on which much uncertainty will result from confusion in the decisions. From the decision in this case it is evident that great and irreparable loss of valuable property may occur by taking the wrong course. The question involved is far reaching in its application and importance. The decision of the Circuit Court of Appeals thus affects many oil operators.

(3) Petitioner sued for the strip described in respondents' deeds, the north line of which was the survey line fixed by Beavers (R. 3). On the trial (R. 214), it appeared that respondents contended that the north line claimed by them at that time intersected the West boundary line of the strip about 10 feet from its northwest corner and ran in a more or less straight line, slightly north of the wells claimed by them, to the southeast corner of the strip, thus leaving more than half of the strip outside of the land claimed by respondents. The findings of the lower court on which the judgment is based (R. 511) are that petitioner satisfied the burden of proof with reference to the portion of the strip north of the line contended for by respondents but rendered judgment against petitioner for the entire strip. (R. 513.) This was pointed out to the Circuit Court of Appeals in petitioner's original brief as well as in its motion for rehearing (R. 531), but has been ignored by the Circuit Court of Appeals and the judgment has been allowed to stand. Thus petitioner has been denied recovery of the portion of the land which the court found petitioner entitled to.

This is a matter of great and far-reaching importance affecting all litigants in the Federal Court. If judgment can stand against a litigant in whose favor the court has found, all litigation in the Federal Court is rendered meaningless.

In the accompanying brief of petitioner the issues and facts supporting petitioner's claims and contentions herein are more fully stated and considered and said brief is referred to in aid hereof.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Hon-

orable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to the Supreme Court of the United States for its review and determination on a day certain to be therein designated a full and complete transcript of the Record and of all proceedings in the said Circuit Court of Appeals in this cause; that the said decree of the said Circuit Court of Appeals in the said cause may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Circuit Court of Appeals (Circuit Judges Edwin R. Holmes and Leon McCord and District Judge Benjamin C. Dawkins; Judge Dawkins writing the opinion of the court) was filed January 20, 1943 and appears at page 522 of the record. It is reported in 132 F. (2d) 790.

JURISDICTION

Jurisdiction in the trial court was based on diversity of citizenship, the requisite amount being involved. (R. 1-3.)

The jurisdiction of this court is invoked under Judicial Code 240 as amended by Act of February 13, 1925, 43 Statutes 938—U. S. C. A., Title 28, Section 347(a).

The judgment sought to be reviewed herein was rendered January 20, 1943. (R. 529.) Date of the order denying a rehearing was March 4, 1943. (R. 539.) Extension was granted May 15, 1943, by Justice Black extending the time in which petition for certiorari could be filed to and including July 5, 1943, and on June 28, 1943, extension was granted by Chief Justice Harlan F. Stone extending the time in which petition for certiorari could be filed to and including July 31, 1943, the originals of which are on file in this Honorable Court.

STATEMENT OF THE CASE

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In holding that the recitations contained in the deed from petitioner's grantor Arthur Christian to respondent describing the old hedge row fence as the south line of the Arthur Christian tract, as well as the same recitation in the Snoddy quit-claim describing the same fence as the north line of the Snoddy tract, are not available to petitioner to prove its south boundary.

(2) In holding that petitioner is estopped by drilling 3 of its 11 wells on the remainder of its tract as offset wells to the three wells drilled by respondents and in failing to set up its title in the hearings when respondents applied

for permits and instead of making such claim of title before the Railroad Commission, electing to make claim of title in court, which claim of title was the beginning of this suit, respondents' knowledge of the title being equal if not superior to petitioner's.

(3) In affirming judgment of the District Court that petitioner's claim be denied for the north part (being approximately one-half) of the strip in dispute in the face of the trial court's findings of fact that respondents only claimed to a line slightly north of the three wells and that petitioner had proved its right to title and possession of the north part of the strip in dispute.

ARGUMENT

SUMMARY OF THE ARGUMENT

(1) When respondents claim under a deed from petitioner's grantor describing the south boundary of grantor's tract of land as contended for by petitioner when coupled with quit-claims from the owner of the adjoining tract containing recitals calling for the same line as the boundary of the adjoining tract, the trial court should have held that such recitals are available to petitioner to prove boundary of its tract and the United States Circuit Court of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

(2) The trial court should not have denied petitioner the right to claim its land because it elected not to appear and set up title before the Railroad Commission of the State of Texas when respondents applied for permits, the petitioner having drilled three of the eleven wells on the remainder

of its land as offsets to the wells drilled by respondents, and later instituted suit in the Federal District Court for title and possession of its land, respondents having at least equal if not superior, knowledge of the title, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court for doing so.

(3) When petitioner sues for a tract of land and respondents only claimed half of the land sued for and the trial court found that petitioner had established its right to title and possession of half, judgment should have been rendered by the trial court for petitioner for the half to which petitioner proved right of title and possession and should not have rendered judgment against petitioner for the whole tract, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court for doing so.

CONFLICT WITH CONTROLLING STATE DECISIONS

I.

When respondents claim under a deed from petitioner's grantor describing the south boundary of grantor's tract of land as contended for by petitioner, when coupled with quit-claims from the owner of the adjoining tract containing recitals calling for the same line as the boundary of the adjoining tract, the trial court should have held that such recitals are available to petitioner to prove boundary of its tract, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

When Arthur Christian executed the conveyance of the minerals within and under his tract under which convey-

ance petitioner owns the southeast 31 acres, he conveyed his entire tract, irrespective of whether or not it extended to a slight extent over into the adjoining survey. This question was settled by the decision in *Ballard v. Stanolind Oil & Gas Company* (5th Cir.), 80 F. (2d) 588, one of the cases cited above, in which one Ballard "discovered" a strip along the north of this same Arthur Christian lease under which petitioner claims in the instant case, from which opinion it will be seen that the Hooper Survey adjoins the Hathaway Survey on the north, the survey line between the two surveys being a common line as in the case of the south boundary between the Hathaway and the Castleberry Surveys. Just as is being attempted in the instant case, the contention was made in the *Ballard* case that the line between the Hooper Survey on the north and the Hathaway ran slightly south of the north boundary line of the Arthur Christian tract, leaving a long, narrow, strip of about four acres which Ballard contended was in the Hooper Survey, and a lease to which Ballard obtained subsequent to the date of the original Christian lease just as was done in this case. The court held that Arthur Christian intended to convey the minerals under his whole tract as shown from the very wording of the lease reciting that the tract was considered 100 acres of land, more or less, being the same land purchased from J. M. Farmer but in a recent survey found to be 107 acres "it being the intention to include all land owned or claimed by lessor in said survey or surveys * * *". The general cover-all clauses reciting that the intention of the parties to convey the entire tract owned or claimed by lessor in said survey or surveys operated to convey the entire tract, *even if it should extend over into the adjoining survey a slight extent*, the court using the following

language discussing the very lease under which petitioner claims in the instant case:

> "* * * he further found that the question which survey the land lay in was immaterial, for that the instruments under which plaintiff claimed, in law embraced and carried title to the strip, *in whichever survey it lay.* * * * It is not, it cannot be disputed that the grantors believed, until defendant purported to discover that the case was different, that the lands they owned were only in the Hathaway survey, and that the fence marked the boundary line between them and the adjoining survey. They did not, until defendant's 'discovery' claim any land in the Hooper survey. They claimed to the fence line as in the Hathaway survey. In the lease under which plaintiff holds, they declare that it was their intention to include in the lease 'all lands owned or claimed in the said survey.' *It has been decided in this state that a cover-all clause of this kind, under circumstances similar to those here, may be looked to to complete and perfect the description in an instrument to make it carry out the intent of the parties.* Sun Oil Co. v. Burns (Tex. Com. App.), 84 S. W. (2d) 442, 444; Sun Oil Co. v. Bennett (Tex. Com. App.), 84 S. W. (2d) 447; Gulf Production Co. v. Spear (Tex. Com. App.), 84 S. W. (2d) 452; Smith v. Westall, 76 Tex. 509, 13 S. W. 540." (Italics ours.)

Since Arthur Christian conveyed his entire tract in the lease under which petitioner holds and petitioner owned the south 31 acres, petitioner owned to the south boundary line of the Arthur Christian tract wherever it may be. A deed obtained by respondents from Arthur Christian five years subsequent in date to the deed under which petitioner holds could not possibly convey any land to respondents, because under the Ballard decision, and many other decisions

in which the law is well settled, Arthur Christian had already conveyed his entire tract and had no strip of land left to convey.

Respondents' deed under Arthur Christian contains a recital describing the Arthur Christian south line as follows:

> "Thence *following a fence on the North line of Thad Snoddy 50-acre tract,* as follows: South 88 deg. 07′ East, 274 feet; South 87 deg. 43′ East, 400 feet; East 500 feet; North 81 deg. 58′ East 128.3 feet; East 473 feet to a stake the Southeast corner of this tract;" (R. 525.) (Italics ours.)

and which when fitted to the ground is found to be the old hedge row fence contended for by petitioner as its south line. (R. 2.) Recitals are binding on privies in blood, privies in estate, and privies in law under a long line of authorities too long to burden the court with here. This question was settled by the Supreme Court of the United States in the celebrated case of *Tarver v. Jackson* (Sup. Ct. of U. S.), 4 Peters B 1; 29 U. S. 84; 7 L. ed. 761.

Respondents did not abandon their Arthur Christian title nor disclaim under the same but introduced it in evidence. It was found in the findings of fact at the trial (R. 504-5), and is recited in the opinion of the Circuit Court of Appeals (R. 525). Under that title respondents are in law estopped. The decision becomes a matter of law and determines the case, the other facts become immaterial.

However, in this case respondents also supplemented their Arthur Christian title with quit-claims under the ad-

joining owner, Snoddy. The recitals in the Snoddy quit-claims (R. 367) also contain the recital

> "*Thence following a fence on the North line of Thad Snoddy 50-acre tract*, as follows: South 88 deg. 07′ East, 274 feet; South 87 deg. 43′ East, 400 feet; East 500 feet; North 81 deg. 58′ East 128.3 feet; East 473 feet to a stake the Southeast corner of this tract." (R. 367.) (Italics ours.)

which description when fitted to the ground is the old hedge row fence and which Snoddy is recognizing as his north boundary line. (R. 2.) The recitals in these quit-claims when taken in connection with the recitals contained in respondents' Arthur Christian deed identifying the Arthur Christian south boundary line as the old hedge row fence bring this case within the terms of *McBride v. Loomis* (Tex. Sup. Ct.), 212 S. W. 480, holding that in trespass to try title when defendant relying on a deed, introduced the same in evidence, the recitals in the deed are available to the plaintiff in the establishment of his title, although defendant was also relying on a quit-claim deed from heirs of a former owner. In the *Loomis* case, just as was done in this case, the defendant sought to avoid the effect of the recitals in his deed by attempting to claim also under a quit-claim to which the plaintiff was a stranger, contending that since the plaintiff was a stranger to the quit-claim he could not avail himself of the recital, the court saying:

> "There was no admission in the trial court by defendant that the administrator's deed was invalid, such admission being made only on appeal. The deed being thus relied on by defendant, and it, together with its recitals were available to plaintiffs in the establishment of their title."

The instant case is stronger than the *Loomis* case in that the respondents have never repudiated any claim under their Christian deed, but claimed under it at the time of the trial, claimed under it in the Circuit Court of Appeals, and still claim under it.

Instead of the case of *McBride v. Loomis*, supra, the Circuit Court of Appeals applies the case of *Kuykendall v. Spiller* (Tex. Civ. App.), 299 S. W. 522, which is not only a decision of an inferior court, but it will be seen that the facts in the instant case, both as stated in the court's opinion (R. 522) and as stated herein, do not come within the law declared in the *Kuykendall* case. That case holds that if the plaintiff is a stranger to a deed the recitals do not bind. That would be true if respondents only claimed under the Snoddy quit-claims. Petitioner is a stranger to the Snoddy quit-claims, but petitioner is not a stranger to respondents' Arthur Christian deeds, as Arthur Christian is petitioner's grantor and petitioner is therefore in privity with them. They therefore bind, and when taken in connection with the Snoddy quit-claims, bring the instant case within the law declared in the *Loomis* case. The trial court therefore was not at liberty to consider any other facts in the case, and all other facts whatever they might be became immaterial and as a matter of law the court was bound to find that the south line of the Christian tract and the north line of the Snoddy tract was that line which both respondents' Arthur Christian deeds and respondents' Thad Snoddy quit-claims, as well as respondents' pleadings, declares it to be, which in the wording of all of respondents' deeds un-

der Christian as well as under Snoddy, as well as respondents' pleadings, is as follows:

> "Thence *following a fence on the North line of Thad Snoddy 50-acre tract*, as follows, 88° 07′ E. 274 Feet; S. 87° 43′ E. 400 feet; East 500 feet; N. 81° 58′ E. 128.3 feet; East 473 feet, to a stake the southeast corner of this tract." (Italics ours.)

which is the line contended for by petitioner. (R. 2.)

We submit, therefore, that the *Loomis* case, the decision being by the Supreme Court of the State of Texas, declares the local Texas law and is determinative of the instant case and since the Circuit Court of Appeals has refused to follow the *Loomis* case, the decision below is in square conflict therewith.

It also becomes apparent that Thad Snoddy quit-claiming land north of his north boundary line and within the Arthur Christian tract could have of necessity conveyed no title and did convey no title.

II.

The trial court should not have denied petitioner the right to claim its land because it elected not to appear and set up title before the Railroad Commission of the State of Texas when respondents applied for permits, the petitioner having drilled three of the eleven wells on the remainder of its land as offsets to the wells drilled by respondents, and later instituted suit in the Federal District Court for title and possession of its land, respondents having at least equal if not superior, knowledge of the title, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court for doing so.

The opinion (R. 527) uses the following language:

> "It also appears that defendants drilled three wells on the tract in dispute after separate applications and hearings before the Railroad Commission of Texas, the body charged with the duty of determining whether permits shall be given, after notice to plaintiff who not only failed to appear and contest defendants' applications, but in each instance, obtained from the same authority permits to drill offsetting wells on their own property immediately north of these locations. It was only after defendants' wells had proved successful and large quantities of oil had been produced, that plaintiff determined to bring this suit."

presumably holding that the conduct mentioned prevent petitioner from claiming its land. Such holding is directly in conflict with the recent decision of the Supreme Court of the State of Texas in *Magnolia Petroleum Company v. Railroad Commission et al.*, 170 S. W. (2d) 189, March 31, 1943, in which it is held that the State Railroad Commission is given the administration of the conservation laws only and has nothing whatsoever to do with titles and grants no affirmative rights to the permittee to occupy the property and, therefore, would not cloud the title of the owner, the court saying:

> "It merely removes the conservation laws and regulations as a bar to drilling the well and leaves the permittee to his rights at common law. Where there is a dispute as to those rights, it must be settled in court. The permit may thus be perfectly valid so far as the conservation laws are concerned and yet the permittee's right to drill under it may depend upon his establishing title in a suit at law. *In such a suit the fact that a permit to drill had been granted would not be admissible in support of permittee's title.*" (Italics ours.)

Thus, the decision of the Circuit Court of Appeals is in direct conflict with the opinion of the Supreme Court of the State on this subject.

III.

DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS CALLING FOR EXERCISE OF SUPERVISORY POWER

When petitioner sues for a tract of land and respondents only claim half of the land sued for and the trial court finds that petitioner had established its right to title and possession of half, judgment should have been rendered by the trial court for petitioner for the half to which petitioner proved right of title and possession and should not have rendered judgment against petitioner for the whole tract, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court for doing so.

The statement of facts on this question will suffice. The law is obvious. It might be noted however, that the first part of Rule 52—Federal Rules of Civil Procedure, Rule 52(a), U. S. C. A., Vol. 28, under Sec. 723(a) provides:

> "(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon *and direct the entry of the appropriate judgment.*" (Italics ours.)

while it is provided by the Texas Statutes, Art. 7386 (R. S. 1925), now covered in the same words by Texas Rule of Civil Procedure, Rule 802, as follows:

> "Art. 7386. When planitiff proves part—Where the defendant claims the whole premises, and the plaintiff shows himself entitled to recover part, the plaintiff shall recover such part and costs."

It is, of course, obvious if litigation is to mean anything whatever that the court must render its judgment in accordance with what it finds the fact to be. Otherwise, litigation in the Federal Courts is rendered entirely meaningless.

It might be noted that the trial court kept this case under advisement from the date of the trial on February 21, 1940 until the 21st day of November, 1941. (R. 513.) During this time, the case was argued orally to the court and several written briefs were presented to the trial court, setting out in detail petitioner's contentions. On appeal, this proposition was presented to the Circuit Court of Appeals in Proposition 2 in petitioner's original brief. It was again urged in petitioner's petition for rehearing. (R. 531.) Petitioner filed a second petition for rehearing in the lower court, and, in addition, a written argument. The written argument urged this ground, and the second petition urged consideration of the original petition which includes this ground. Yet, it will be noted that neither the opinion nor the orders denying the first or second petition for rehearing mention or touch on this point, all of them completely ignoring petitioner's contention here made.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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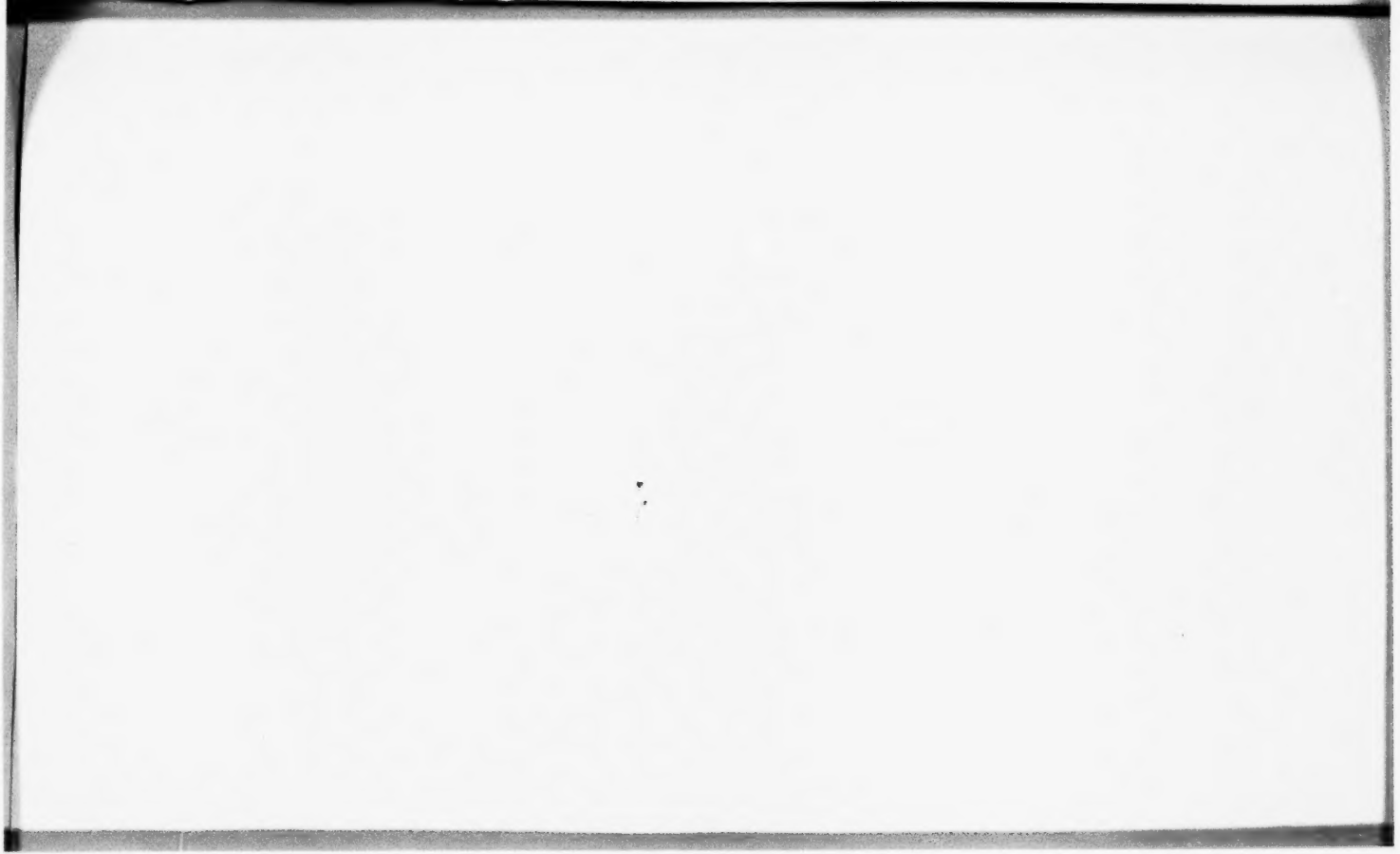

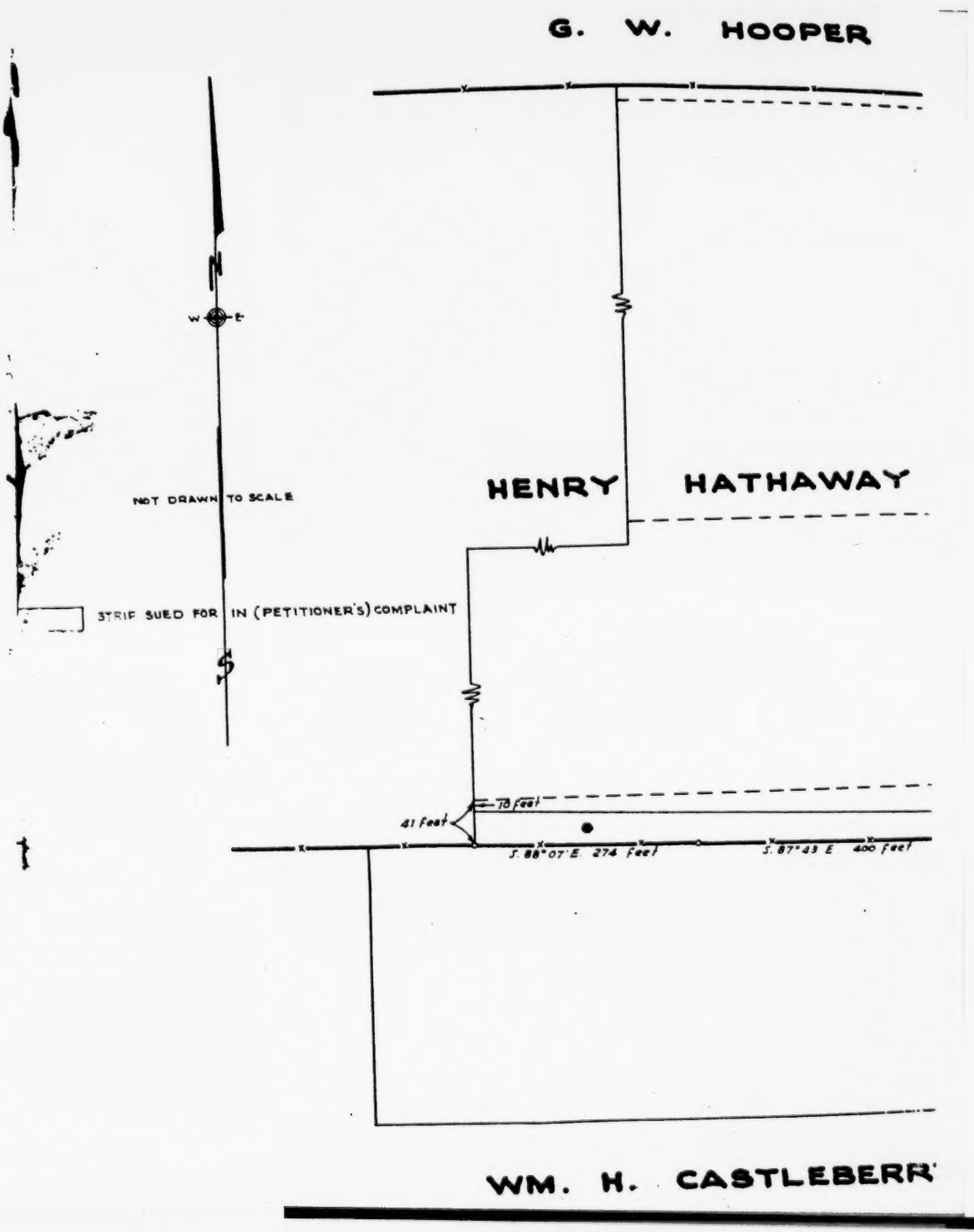
G. W. HOOPER
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HENRY HATHAWAY
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41 Feet
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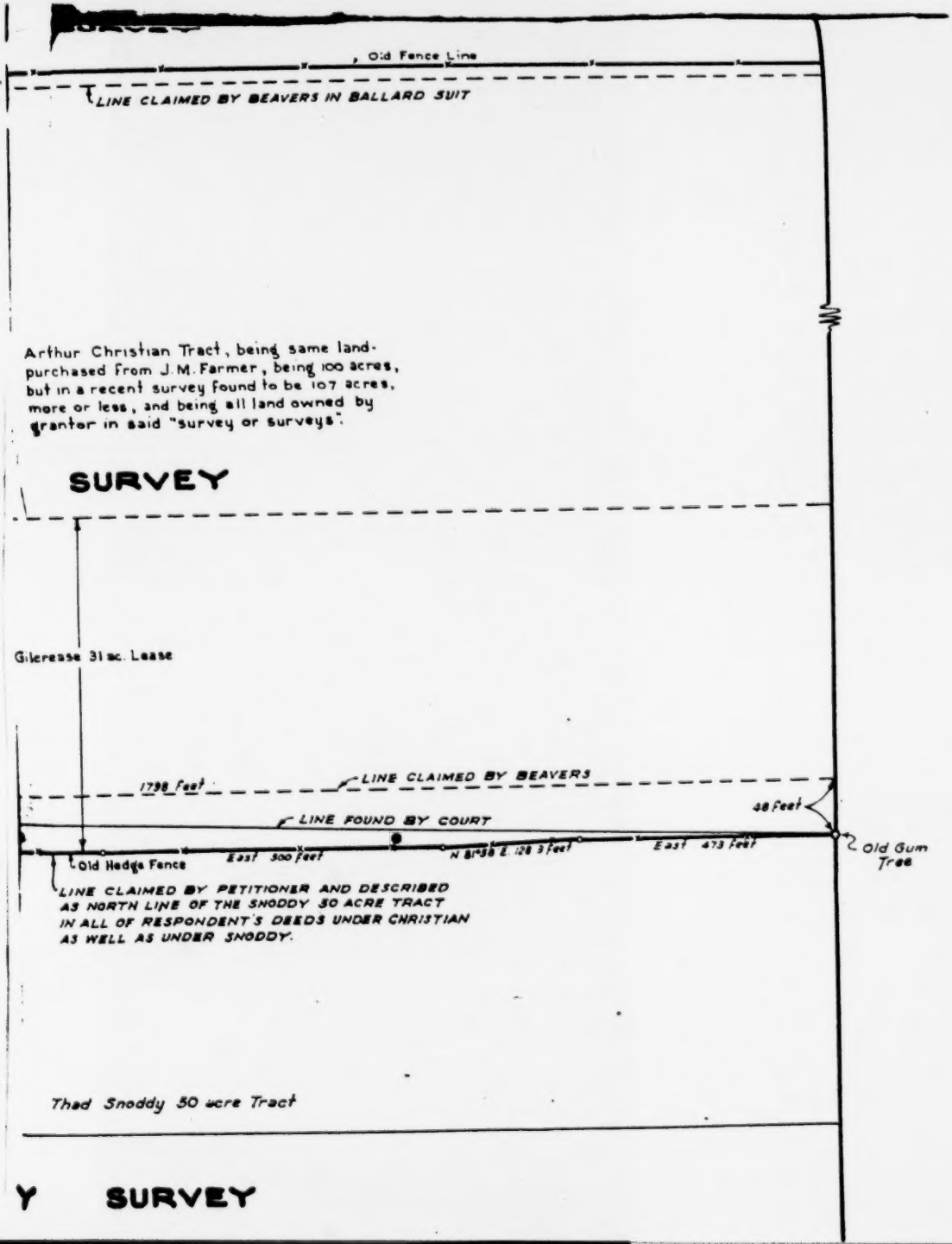
S. 87° 43' E. 400 Feet
WM. H. CASTLEBERRY


Old Fence Line
LINE CLAIMED BY BEAVERS IN BALLARD SUIT
Arthur Christian Tract, being same land purchased from J.M. Farmer, being 100 acres, but in a recent survey found to be 107 acres, more or less, and being all land owned by grantor in said "survey or surveys".
SURVEY
Gilcresse 31 ac. Lease
1798 Feet
LINE CLAIMED BY BEAVERS
48 Feet
LINE FOUND BY COURT
Old Gum Tree
Old Hedge Fence
East 300 feet
N 81°38 E. 128.3 Feet
East 473 Feet
LINE CLAIMED BY PETITIONER AND DESCRIBED AS NORTH LINE OF THE SNODDY 30 ACRE TRACT IN ALL OF RESPONDENT'S DEEDS UNDER CHRISTIAN AS WELL AS UNDER SNODDY.
Thad Snoddy 50 acre Tract
SURVEY

In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 214

GILCREASE OIL COMPANY, *Petitioner,*

v.

G. M. COSBY, *et al.*, *Respondents.*

RESPONDENTS' BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

RESPONDENTS' BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Supreme Court of the United States and the Honorable Judges Thereof:

Respondents, G. M. Cosby, Mrs. Rosa Croley, surviving widow and sole legatee of J. W. Croley, deceased, and B. A. Skipper, respectfully pray that this Honorable Court deny petitioner's application for writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, and that said application be dismissed for the reasons hereinafter set out.

RESPONDENTS' ADDITIONAL STATEMENT OF THE CASE

The statement contained in the petition for writ of certiorari on the whole is correct, but respondents desire to

make a brief additional statement to correct certain inaccuracies and omissions therein.

While this suit as originally brought is in form of trespass to try title in Texas, it was tried in the District Court for the Eastern District of Texas as a boundary suit, and the issue involved was the location of the boundary line between the two adjoining surveys, namely, the Hathaway Survey on the north and the Castleberry Survey on the South, and the boundary line between the Arthur Christian tract of land in the Hathaway Survey and the Thad Snoddy tract of land in the Castleberry Survey; also to determine whether or not the three oil wells which were drilled by respondents on the two-acre strip of land referred to in the petition for writ of certiorari were located on land out of the Arthur Christian tract in the Hathaway Survey or were on lands out of the Thad Snoddy tract in the Castleberry Survey. Obviously the determination of this issue involved questions of fact which were passed on both by the District Court and by the Circuit Court of Appeals.

On conflicting evidence the trial court found (a) the true line between the Arthur Christian land in the Hathaway Survey and the Thad Snoddy land in the Castleberry Survey; (b) the Arthur Christian southernmost line of possession and occupation, which was the fence which had stood along the north side of the old lane between the Christian and Snoddy tracts; and (c) that all of these lines were north of respondents' three oil wells, and that petitioner had no title to them. (R. pp. 508, 509 and 510.)

Reference is made in the summary statement contained in the petition for writ of certiorari to what is called "Snoddy quit-claims." The instruments referred to as "Snoddy

quit-claims" are (1) an affidavit of Thad Snoddy dated February 11, 1936 (R. p. 362) and (2) an assignment from B. A. Skipper Oil Company and B. A. Skipper to J. W. Croley, dated July 1, 1936 (R. pp. 365 and 366); the latter instrument containing language of conveyance and transferring and assigning unto J. W. Croley a certain oil and gas lease originally executed by Thad Snoddy, and not being the Christian lease under which petitioner claims. (R. p. 367.)

Upon the findings of fact and conclusions of law (R. pp. 502 to 512), the trial court entered judgment that the plaintiff take nothing from the defendants. (R. p. 513.) Petitioner did not at that time move nor request the court by motion or otherwise to alter or amend the judgment so that a small portion of the strip on which none of the wells were located might be awarded to petitioner. There was no substantial controversy during the trial of the case about this small part of the land now complained of in petitioner's application for writ of certiorari. None of the three wells in controversy were located thereon (R. p. 510), and same was not shown to be of any value; petitioner never contended for it separate and apart from its right to recover the whole tract. (R. pp. 2 to 5.)

The issue of fact turned upon the actual location on the ground of the tract in dispute and both the District Court and the Circuit Court have passed upon that issue of fact. (R. pp. 509 and 525.)

JURISDICTION OF SUPREME COURT

Respondents desire to call the attention of the court to the statement as to the proceedings in the Circuit Court

of Appeals for the Fifth Circuit contained on page 14 of the Brief of Petitioner in support of Petition for Writ of Certiorari. Under Section 350 Title 28, *U. S. C. A.*, and the holding of this Court in *Gypsy Oil Company v. Escoe*, 48 Sup. Ct. 112, 275 U. S. 498, 72 L. ed. 393, the petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit filed on July 30, 1943 by petitioner herein is filed too late, even though extensions of time were granted as set forth in the petition for the writ. Section 350, Title 28, *U. S. C. A.* provides among other things:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

This section provides that for good cause shown the period for applying for a writ of certiorari may be extended, not exceeding 60 days, by a Justice of the Supreme Court. We direct attention to the fact that petitioner, after the order of March 4, 1943 (R. p. 537) denying the first motion for rehearing was entered, filed on May 1, 1943, a motion for leave to file a second petition for rehearing (R. p. 538), which motion for leave to file such second petition for rehearing was denied by an order entered on July 3, 1943. (R. p. 549.) Under the holding of the *Gypsy Oil Company case* the presenting by petitioners of a motion for leave to file a second petition for rehearing, which leave was never granted, did not suspend the running of the time within which the petition for writ of certiorari could be filed, namely, three months from March 4, 1943.

RESPONDENTS' REPLY TO PETITIONER'S SPECIFICATION OF ERROR NO. 1

Petitioner did not acquire any title by virtue of an erroneous recitation in deeds and assignments under which respondents claimed, and to which petitioner was a stranger, which recitation is ambiguous when placed upon the ground as a part of the description, particularly since petitioner's title originated long prior to such instruments so that it did not rely thereon, and the recitation is not a recital in its favor and especially since respondents acquired from the true owner a title paramount to petitioner's title and the Circuit Court of Appeals did not err in so holding.

RESPONDENTS' REPLY TO PETITIONER'S SPECIFICATION OF ERROR NO. 2

The judgment of the trial court, as well as the opinion of the Circuit Court of Appeals, was primarily based on the finding and location of the boundary line between petitioner's tract of land and respondents' tract, and upon the finding of fact that the three wells in controversy are not located on lands of petitioner. The fact that the trial court, as well as the Circuit Court of Appeals, held that in addition to such finding, petitioner, by its conduct, would in equity be estopped from asserting title to the three wells in question, was not error. Neither the judgment of the trial court nor the opinion of the Circuit Court of Appeals was based upon a holding that petitioner failed to set up its title in hearings before the Railroad Commission of Texas.

RESPONDENTS' REPLY TO PETITIONER'S SPECIFICATION NO. 3

It was not error on the part of the Circuit Court of Appeals in affirming judgment of the District Court that petitioner's claim be denied for the north part of the strip in dispute, contrary to the trial court's findings of fact, where it appears the controversy was over three oil wells none of which were located on the north part of such strip complained of by petitioner, and where such portion is not shown to have any value and petitioner never asked that judgment be reformed in its favor therefor.

ARGUMENT

SUMMARY OF ARGUMENT

1. Where the trial court, upon conflict of evidence, finds that the three oil wells in controversy are not covered by petitioner's oil lease, and are not located on land ever owned by or in the possession of petitioner or its predecessors in title, but does find that they are located on lands covered by respondents' lease acquired from holder of paramount title located in a different survey, such findings of fact are conclusive on this Court, as well as on the United States Circuit Court of Appeals.

2. The trial court did not deny petitioner's right to claim land because it elected not to appear and set up title before the Railroad Commission of Texas, but did find that petitioner by its conduct in procuring three oil wells as offsets to the three wells drilled by respondents, to which petitioner would not otherwise have been entitled, would in equity be estopped from later asserting title to respondents' three

wells. This finding was in addition to the fact finding that petitioner, having the burden to establish its title to the three wells in controversy, failed to do so.

3. The controversy between petitioner and respondents was over the ownership of three oil wells located on the south portion of a two-acre strip of land in the Castleberry Survey in Gregg County, Texas; and upon trial of the issue the trial court determined the true boundary line between petitioner's land and that of respondents, and found that all three of the wells were located on lands belonging to respondents. In the absence of any showing that the remainder of the strip had any value, and the absence of request for amendment of judgment, petitioner can not now complain of alleged departure from accepted and usual course of judicial proceeding.

NO CONFLICT WITH STATE DECISIONS

I.

Petitioner did not acquire any title by virtue of an erroneous recitation in deeds and assignments under which respondents claimed, and to which petitioner was a stranger, which recitation is ambiguous when placed upon the ground as a part of the description, particularly since petitioner's title originated long prior to such instruments so that it did not rely thereon, and the recitation is not a recital in its favor, and especially since respondents acquired from the true owner a title paramount to petitioner's title; and the Circuit Court of Appeals did not err in so holding.

Petitioner cites the case of *Ballard v. Stanolind Oil & Gas Co.* (5th Circuit), 80 F. (2d) 588, as supporting his

Specification of Error No. 1. The facts in that case are entirely different from the facts in the instant case. The *Ballard case* announces the correct principles of law when the court in its opinion in that case says:

> "The purpose of a re-survey is to trace the footsteps of the original surveyor. When the marks of his footsteps are found they control. When they cannot be found old use and occupancy, old recognition, must suffice. * * * Without the fence and the occupancy to fix the original line, the true location of it would be left in great uncertainty and obscurity. With that evidence, whether the fence be viewed as a boundary line established by acquiescence, or as evidence of where the old line truly was, we agree with the District Judge that the boundary line between the surveys may and should be fixed by it."

It will be noted that the two-acre tract in question in this suit is out of the Castleberry Survey, while the one hundred acre tract under which the petitioner claims is out of the Hathaway Survey. The original monuments called for in the patents of the two surveys no longer exist. The evidence shows that in 1896 the Hathaway Survey was divided into two parts by the then owners, Rucker and Bass (R. p. 376), and that in fixing the south line of the Hathaway Survey in this deed two monuments, a red oak tree and sweet gum tree, are called for, and that the same are still on the ground and well marked and identified by some of the witnesses. (R. pp. 195 and 200.) These monuments, together with the existence of the old line between the two tracts found by the surveyor Grothaus prior to the acquisition of any title either by petitioner or by respondents (R. p. 199), as well as the testimony of former owner of the land in question, constituted a sufficient basis for the trial court finding and locating the true boundary line between the two tracts

of land. (R. p. 509.) They constituted the best evidence of the true boundary line. As said by the Court of Civil Appeals of Texas in *Atlantic Oil Producing Company, et al. v. Hughey, et al.*, 107 S. W. (2d) 613, and afffimed by the Supreme Court of Texas, 109 S. W. (2d) 1041, the answer to the question of locating boundaries is to be found in following the footsteps of the surveyor. This is the established rule in Texas.

Petitioner attached much importance to the recitation in the various deeds and assignments both from Arthur Christian and Thad Snoddy to respondents, which reads: "Thence following a fence on the North line of Thad Snoddy 50-acre tract. * * *" The evidence showed that this recitation when fitted on the ground and applied to the facts as found on the ground was ambiguous; that the fence along the boundary line between the two tracts of land had been moved since the oil boom. (R. p. 289.)

As stated by petitioner in his brief in support of his petition for writ of certiorari (page 18), "it owned to the south boundary line of the Arthur Christian tract wherever it may be." The trial court found and located the south boundary line of the Arthur Christian tract, both the record line (R. p. 509, Subdivision 11 of the Findings of Fact) and the southernmost line of occupation (R. 509, Subdivision 12 of the Findings of Fact). These findings were based upon conflicting evidence and testimony and were affirmed and upheld by the Circuit Court of Appeals for the Fifth Circuit. It has long been the rule in this Court that where such findings have been made by the two lower courts this Court will not disturb them. *Page v. Arkansas Natural Gas Corporation*, 286 U. S. 269, 76 L. ed. 1096.

It is true that recitals are binding on privies in blood, privies in estate and privies in law, but certainly not binding on, and cannot be taken advantage of by, total strangers. Petitioner holds title under Arthur Christian to a 31-acre tract out of the Hathaway Survey. (R. p. 354.) Respondents hold title under Thad Snoddy to that portion of a two-acre tract upon which respondents' wells are located, which is in an entirely different survey, namely the Castleberry Survey. (R. pp. 365 and 473.) The fact that respondents also had an assignment of the Arthur Christian lease executed subsequent to petitioner's lease would not prevent them from acquiring an outstanding paramount title. These assignments from Skipper and Bumpass did not cover any land owned by petitioner. The chain of title under which petitioner holds and the chain of title to the Thad Snoddy tract are entirely different and independent of each other.

The facts in the case of *McBride v. Loomis* (Texas Supreme Court), 212 S. W. 480, are entirely different from the facts in this case, and the opinion of the Circuit Court of Appeals in this case is not in conflict with that decision. In the first place, it is shown that the reference to the fence along the north line of the Thad Snoddy tract, about which petitioner is so insistent, was an erroneous reference, and when fitted to the facts on the ground did not apply. At most under the holding in the *Loomis case*, it would only be evidentiary. The trial court upon sufficient facts repudiated petitioner's theory that the so-called fence was along the old hedge row. The following quotation from the case of *McBride v. Loomis* is sufficient to show that the facts in

that case are entirely distinguishable from those of this case:

> "The quit-claim deed from the Howard heirs to defendant did not constitute the acquisition of a new and independent title, but merely supplemented the title theretofore held and claimed by him under Howard, the common source."

Certainly the purchasing by respondents for valuable consideration of the outstanding title from Thad Snoddy and his subsequent vendees, as was done in this case, constituted the acquisition of a new and independent title.

As said by the Supreme Court of Texas in the case of *Rice v. St. Louis A. & P. Ry. Co.*, 22 S. W. 1047:

> "Notwithstanding the proof of the insufficiency of his title under the common source, the defendant may still default the action by showing that there is a title superior to that of the person or persons under whom both claim, and that he is the holder of that title."

An estoppel cannot be invoked as an instrumentality of gain or profit. The rule is announced by the Supreme Court of the State of Texas in *Williams v. Chandler* (25 Tex. 4):

> "The doctrine of estoppel, invoked by the plaintiff's counsel, manifestly has no application to his case. Recitals in deeds operate as estoppels only between the parties to the deed and privies. They do not operate a conclusion or estoppel in favor of a stranger to the instrument, any more than does a record operate an estoppel in favor of or against one who was not party to the record. Nothing is better settled than that a special averment or recital in a deed or instrument under seal is conclusive between the parties and privies, against the party by whom it is made, in the course of the transaction in which it is given. But this rule must be taken with the qualification that the estoppel by an admission under seal only arises in suits founded upon the instrument which contains the recital, or growing

out of the transactions in which it is given, and not in other and collateral controversies, even between the same parties. Carpenter v. Butler, 8 Mec. & W. 206; 2 S. M. L. C. 579, 4th Am. ed.; and see the notes to the leading case of Trevivan v. Lawrence, id. 435; and 4 Kent. Com. 260, and notes for the law of estoppels."

II.

The judgment of the trial court, as well as the opinion of the Circuit Court of Appeals, was primarily based on the finding and location of the boundary line between petitioner's tract of land and respondents' tract, and upon the finding of fact that the three wells in controversy are not located on lands of petitioner. The fact that the trial court, as well as the Circuit Court of Appeals, held that in addition to such finding, petitioner, by its conduct, would in equity be estopped from asserting title to the three wells in question, was not error. Neither the judgment of the trial court nor the opinion of the Circuit Court of Appeals was based upon a holding that petitioner failed to set up its title in hearings before the Railroad Commission of Texas.

This contention of petitioner is based upon the alleged conflict of the holding of the Circuit Court of Appeals for the Fifth Circuit in the instant case with the holding of the Supreme Court of Texas in *Magnolia Petroleum Co. v. R. R. Commission, et al.*, 170 S. W. (2d) 189. The *Magnolia case* was a Rule 37 case purely and simply. No one has ever claimed that the Railroad Commission of the State of Texas has jurisdiction to try titles to land. All the *Magnolia case* holds is that the granting of a permit by the Railroad Commission merely removes the conservation laws and regulations as a bar to the drilling of wells. That case has nothing whatever to do with the principles of law involved in an

equitable estoppel. In the first place, as heretofore pointed out, the trial court found that the three wells in controversy drilled by respondents were not included within the confines of the lease owned by petitioner. (R. pp. 507, 509 and 510.) This finding of fact was based upon ample evidence introduced on the trial of this case and was not and should not have been disturbed by the Circuit Court of Appeals. The trial court further found that over the period of some two and a half to three years respondents obtained permits at different times for the drilling of three oil and gas wells on their land, and that shortly after the obtaining of each permit by respondents the petitioner would go before the Railroad Commission and obtain a permit to offset each of such wells. (R. pp. 507 and 508, paragraph 9 of the trial court's findings of fact; and page 510, paragraph 14 of the trial court's findings of fact.) Certainly such conduct on the part of petitioner could at least form the basis of an estoppel. It is a well-known principle of law that "a person who knows the facts and who without objection permits another to make improvements or expenditures on or in connection with his property, or in derogation of his rights, under a claim of title or right, will be estopped to deny such title or right to the prejudice of the other." *Corpus Juris Secundum*, Vol. 31, Sec. 94, page 314. Not only did petitioner remain silent for a period of two years during the drilling of respondents' wells, in so far as asserting any title was concerned, but following the granting of each of the three permits to respondents, petitioner went before the Railroad Commission of Texas as each well was completed, and applied for and obtained a permit and drilled a well offsetting respondent's well. (R. pp. 478 to 491.) While it is true that the Railroad Commission of Texas is not a court or body

that can try titles to land, if petitioner considered respondents as a trespasser on its land it had its remedies in the courts. Coupled with this silence and inaction, petitioner, who obviously desired to drill additional wells, makes its application for its offsets as aforesaid.

Guest v. Guest (Sup. Ct. of Texas), 74 Tex. 664, 12 S. S. W. 831;

South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507;

Luling Oil & Gas Co. v. McBride Pet. Co. (Tex. Civ. App.), 135 S. W. (2d) 738;

Loper v. Menshaw Lbr. Co. (Tex. Civ. App.), 104 S. W. (2d) 597.

The finding by the trial court on the issue of estoppel was not necessary in view of the fact that the trial court found, as well as the Circuit Court of Appeals, that petitioner neither had record title nor possession of the portion of the land on which the three wells of respondents were located. Petitioner had the burden of establishing its title to the three wells and failed in that burden, and the findings as to boundaries were in truth and in fact determinative of the issues in this case.

THERE WAS NO DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THIS CAUSE CALLING FOR EXERCISE OF SUPERVISORY POWER BY THIS COURT.

III.

It was not error on the part of the Circuit Court of Appeals in affirming judgment of the District Court that petitioner's claim be denied for the north part of the strip in

dispute, contrary to the trial court's findings of fact, where it appears the controversy was over three oil wells none of which were located on the north part of such strip complained of by petitioner, and where such portion is not shown to have any value and petitioner never asked that judgment be performed in its favor therefor.

The matter at issue, as has been stated herein, was the location of a boundary line. Petitioner filed his suit on a certain tract of land which it alleged was within the boundary of its 31-acre lease.

The area involved is only a few feet and does not have any wells on it, and in so far as the mineral estate is concerned is valueless. The record is silent that petitioner ever at any time called the attention of the trial court to the fact that there might be some few feet of the land in controversy to which it would be entitled to a judgment.

The *Federal Rules of Civil Procedure* amply cover this situation and authorize clerical mistakes to be corrected at any time on the court's own motion or on the motion of any party. Rule 60, *Federal Rules of Civil Procedure, Subdivision a:* "Clerical mistakes in orders, judgments or other parts of the record and errors arising therein from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party, and after such notice, if any, as the court orders."

No motion was filed by petitioner in the trial court asking that such judgment be amended. Of course Article 7386

of the Texas Statutes (now Rule 802 of the *Rules of Procedure in Texas)*, has no application to cases under practice in the United States courts.

Rule 61, *Federal Rules of Civil Procedure*, is applicable to this case; it reads:

> "No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court, or by any of the parties, is ground for granting a new trial, or for setting aside a verdict or for vacating, modifying or otherwise disturbing an order or judgment, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The evidence shows that petitioner has drilled on its own land three offset wells to the three wells drilled and owned by respondents, so that it is presumably recovering its share of the oil. The failure of the judgment to award to petitioner a few feet of ground in between petitioner's wells and those of respondents, on which there are no wells and which has no value, certainly is harmless error, and apparently was so considered by both the trial court and the Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, filed by petitioner, should be denied.

Respectfully submitted,

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(17)

In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 214

GILCREASE OIL COMPANY, *Petitioner*,

v.

G. M. COSBY *et al.*, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF

To the Supreme Court of the United States and the Honorable Judges Thereof:

Petitioner replies to respondents' brief as follows:

JURISDICTION

Respondents assume that petitioner has counted time from date of denial of Second Petition for Rehearing. That is not correct. The First Motion was overruled March 4, 1943; three months thereafter would be June 4, 1943, but prior to the expiration of the three months' period, on May 15, 1943, petitioner's request for an extension of time was granted by this Honorable Court until July 5, 1943. Before the expiration of the extension, on June 28, 1943, an additional extension was granted by this Court until July 31, 1943, petitioner's petition, brief, and the record from the lower court being filed herein prior to said date.

STATEMENT

Respondents agree in their brief that this is a suit to fix boundary. The only question in the suit was to determine the north boundary of the Thad Snoddy 50-acre tract because that would be the south boundary of the Arthur Christian tract.

Respondents asked *affirmatively* in their pleadings for recovery of the strip (R. 19, 29), alleging in their pleadings that the line alleged by petitioner as the *south* line of the Arthur Christian tract (R. 2) was the *north* line of the Thad Snoddy tract (R. 12, 23); the pleadings of one of the respondents expressly alleging (R. 7) that "a portion of the tract of land was included within the fence of the Arthur Christian tract." The pleadings of both the petitioner and respondents unite in alleging that the following line is the south line of the Arthur Christian tract and the north line of the Thad Snoddy tract:

> "Thence following a fence on the North line of the Thad Snoddy 50-acre tract, as follows: South 88° 07′ East 274 feet; South 87° 43′ East 400 feet; East 500 feet; North 81° 58′ East 128.3 feet; East 473 feet, to a stake the Southeast corner of this tract."

All of respondents' instruments or deeds under Arthur Christian (petitioner's grantor), as well as Snoddy, on which their title is based, describe the same identical line as the *north* line of the Thad Snoddy tract of land. See defendant's Exhibits 19 (R. 361), 20 (R. 364), 40 (R. 367), 41 (R. 368), 21 (R. 370), 43 (R. 475), 44 (R. 476). Also, petitioner's Exhibits 51 (R. 435), 52 (R. 438), 53 (R. 440), 54 (R. 442), 55 (R. 445), 56 (R. 449), 90 (R. 461) and 92 (R. 464.)

It will be noted that the assignment referred to by respondents at the top of Page 3 of their brief was respondents' Exhibit 40 (R. 365) and is a quit-claim referred to in the opinion of the lower court as such (R. 524). It expressly describes the line petitioner contends for *as petitioner's south* line (R. 2) as the *north* line of the *Snoddy tract* (R. 367). All of the Arthur Christian deeds as well as the Snoddy quit-claims are in evidence at the instance of respondents *for all purposes* as their muniments of title and without limitation or restriction whatever, as was the case with the probate proceedings and the Kerber deed under which Loomis held in the *McBride* case. (Tex. Sup. Ct., 212 S. W. 480.)

REPLY TO RESPONDENTS' ANSWER TO PETITIONER'S SPECIFICATION OF ERROR NO. 1

(Top of Page 5, Respondents' Brief)

Petitioner does not seek to acquire any title "by virtue of erroneous recitations in respondents' deeds." Petitioner claims title by virtue of being the owner of the original Arthur Christian lease which covers the entire Arthur Christian tract and extends to the Arthur Christian *south* line wherever it may be, and irrespective of whether or not the Arthur Christian tract extends to a slight extent over into the Castleberry survey. Since respondents' pleadings, as well as all their instruments, fixed the *north* line of the Snoddy tract as being the same line claimed by petitioner as its *south* line, the true position of the line is a matter of law and not a question of fact to be decided by the court. Since it is a question of law and is the line which both the petitioner and respondents unite in alleging and which all

of respondents' instruments show it to be, it is fixed on the ground as a matter of law as the *north* line of the Snoddy tract; and since the line between the two tracts is *common*, and the two tracts adjoin and petitioner owns to the *south* line of the Arthur Christian tract under a lease covering the whole Christian tract executed five years prior in date to respondents' lease from the same Arthur Christian covering the same land, petitioner owns the minerals under the land by virtue of a prior lease and not by virtue of any so-called "erroneous recitations" in respondents' deeds.

Respondents had no "paramount title" from any "true owner." They claimed under both the Arthur Christian title and the Thad Snoddy title, and the trial court found both. (R. 504-507.) Also the Circuit Court of Appeals in its opinion holds the same. (R. 521-525.) Respondents supplemented their Christian title with their Snoddy quit-claims, as was done in the *McBride* case. Since their *Christian* title was five years later in date than the *Christian* title of petitioner and covered the same land covered by petitioner's title, respondents received no title under the *Christian* instruments; and since all of the land lay *north* of the Thad Snoddy *north* fence, they certainly received nothing under the *Snoddy* quit-claims. Therefore, respondents have no "paramount title" or, in fact, any title of any kind.

Respondents have admitted in their pleadings that the north line of the Snoddy tract is the identical line petitioner alleges it to be; and since all of respondents' instruments absolutely prove that to be true and since respondents did not allege mistake or ask for reformation of their instruments, the location of the land becomes a *matter of law* and not a question of *fact* to be decided by the court.

While it is true that petitioner thinks the finding of the lower court fixing the dividing line between the two tracts at a different place than alleged by respondents and in the face of and contrary to the allegations of respondents' pleadings and contrary to and in the face of all of respondents' instruments under which they claim, is manifestly contrary to the evidence, *petitioner is not asking this court to review the evidence.* What petitioner is asserting is that since respondents' pleadings allege the same line to be the *north* line of the *Snoddy* tract that petitioner alleges it to be, the pleadings of both parties unite in alleging it to be at the same place on the ground and the descriptions in all of respondents' instruments under Christian as well as under Snoddy show it to be at the same place alleged by all the pleadings, the location of the line is a question of *law*, not of fact.

ARGUMENT

I.

PETITIONER'S REPLY TO SECTION 1 OF RESPONDENTS' ARGUMENT

(Beginning on Page 7 of Their Brief)

Respondents say, the land in question is out of the Castleberry survey, but at the same time admit the original land marks of the survey no longer exist.

The case of *Ballard v. Stanolind Oil & Gas Company* (5th Cir.), 80 F. (2d) 588, holds that the original Arthur Christian lease dated April 28, 1930, petitioner's Exhibit 9 (R. 340-344), under which petitioner holds, covers the entire Arthur Christian tract, even if the Arthur Christian tract does extend to a slight extent over into the adjoining sur-

vey. In that case *this very lease* was under consideration and the court held that the entire tract was covered by the lease, expressly holding that the entire Arthur Christian tract is covered even though it does extend over into the adjoining survey. Thus, it would make no difference even if the tract did extend to a slight extent into the adjoining Castleberry survey.

Since it has been already held that this identical lease under which petitioner holds covers the entire Arthur Christian tract, it is immaterial where the original survey line ran; because the pleadings of both petitioner and respondents unite in fixing the dividing line between the Christian and the Snoddy tract at a definite place on the ground and the recitals in all of respondents' instruments fix it at the same place. This determines and fixes the *survey line* at the same place as the *property line*, as was held in the *Ballard* case.

The line alleged in all the pleadings to be the dividing line and described in all of respondents' instruments as being the north line of the Snoddy tract is not ambiguous in itself nor when fitted to the ground and there is no evidence and no finding to that effect. Respondent says it is ambiguous because it does not conform to the line found by the lower court. That does not make it ambiguous. It was the fence *found by the court* that had been moved (field notes reciting "as fenced 1931" R. 509, also see R. 178), *not the old hedge fence.* But it will be noted by reference to respondents' Arthur Christian instruments (R. 361, 364, 368 and 370), as well as all of their other descriptions, that the field notes for the fence "on the north line of the Thad Snoddy 50-acre tract" are tied in with the old gum

tree which is still on the ground. (R. 505, 508, 509.) Therefore, its location on the ground is definite and positive and can be at no other place than as described in the pleadings of both petitioner and respondents, as well as all of the instruments under which respondents claim. The moving of the fence would not make the field notes ambiguous. The leveling of the old hedge row would not make the field notes ambiguous, nor would the fact that it marks or does not mark the division of the Hathaway and Castleberry surveys make it ambiguous, nor would it be material if it is slightly over in the Castleberry survey.

Of course, in any case where the location of a boundary line is a question of fact, the task would be to find the footsteps of the original surveyor; but where the line is fixed by the instruments and the pleadings of all of the parties, it ceases to be a question of *fact* and becomes one of *law.*

Respondents claim the *Snoddy quit-claims* are a "superior outstanding title."

Petitioner has not said that defendant could not under the law set up a superior outstanding title, *but what petitioner has said is that respondents did not do so in this case.* Respondents have held and claimed under the *Christian* title from the beginning, claimed it before the Railroad Commission (R. 310), claiming it continually up to the trial, Exhibit 92 (R. 463), having signs on the wells labeling them as *Arthur Christian wells,* a sign on each well showing it as Arthur Christian Well No. 1, Castleberry Survey; Arthur Christian Well No. 2, Castleberry Survey; and Arthur Christian Well No. 3, Castleberry Survey, up to and during the time of the trial (photographs of these wells showing the signs being in evidence as Exhibits 71, 72

and 73, originals sent up), claiming under the *Christian* title at the trial, introducing all of the *Christian* instruments *for all purposes*, and without limitation (R. 312, 314, 315, 319, 320); and the *Christian* instruments are found by the trial court (R. 504-7), and again appear in the opinion of the Circuit Court of Appeals. (R. 523-4.) Thus, it is clear that the *Snoddy quit-claims* were merely *supplemental* and *supplemented* the *Christian* title under which respondents claimed, as held in *McBride v. Loomis.*

There is no outstanding title in the Snoddy quit-claims because all of them quit-claim land *north* of the Thad Snoddy *north* fence and *within the Christian tract* and, therefore, cannot, and do not, convey any title. Under the *Christian* deeds respondents receive no title because Arthur Christian had already conveyed his entire tract more than five years before the date of respondents' deed and petitioner holds under the prior deed.

Respondents cite *Williams v. Chandler*, 25 Tex. 4, which is a case in which one Cook in the early days of Texas in the year 1831 received a grant of land from the Stephen F. Austin Colony. The law as it was at that time forbade the alienation of the land for six years. In violation of the law, Cook made an attempted conveyance in the form known at the time as a "bond for title" to Williams of the south half of the land. Cook thereafter, and after he had held the league a sufficient length of time to make valid conveyances out of it, made certain conveyances to third persons of various tracts out of the north half of the league which he had kept, in which conveyances there were certain recitals that the south half of the league had been sold to Williams. After Cook's death, Williams sued the heirs of Cook for the south

half of the league on the void bond for title, claiming the benefit of the recitations in the deeds Cook had made to third persons not in any way parties to the suit or in any way involving the land in dispute. The court held that since the bond for title was absolutely void, being in violation of an express law, and since the recitations were only in deeds to third parties conveying different land other than the land involved in the suit, that Williams could not take advantage of them. To have allowed Williams to recover by virtue of the recitals would have allowed a sale of the south half of the land to stand that was expressly prohibited by law. But, if the bond for title had not been void, but only indefinite and subject to interpretation or completion by the recitals in the deeds and the deeds containing the recitals in question were being claimed under in that very suit and included the very land involved in the suit as they are in our case, the result would have been otherwise, and the law would have been declared as it was in the later case of *Havard v. Smith* (Court of Civil Appeals), 13 S. W. (2d) 743, which gives the benefit to a party who was not named as a party to the deed. Havard in that case had executed a deed to Falvey. That deed described a 73-acre tract. At the end of the description it recites that the land conveyed contained "73 acres of land, less 50 acres of said tract conveyed to C. C. Cherry." C. C. Cherry was not by name a party to that deed except under that recital. There was no deed of record from Havard to Cherry. Nevertheless, the heirs of Cherry sued the heirs of Havard and Falvey to recover that 50 acres. The Court of Civil Appeals held that the recital of "less 50 acres of said tract conveyed to C. C. Cherry" constituted an absolute muniment of title in favor of the heirs of C. C. Cherry and was sufficient to predicate an

instructed verdict in their favor in the trial court, which was affirmed in the Court of Civil Appeals.

The law declared in the case of *Havard v. Smith* has been often cited with approval by the Supreme Court of Texas. In *Simonds et al. v. Stanolind Oil & Gas Company* (Tex. Sup. Ct.), 114 S. W. (2d) 226, it is said that such "recitals might take the place of a deed or form in effect a muniment of title", citing *Havard v. Smith*, 13 S. W. (2d) 743. And in *Turner et al. v. Hunt et al.* (Tex. Sup. Ct.), 116 S. W. (2d) 688, it is said: "This formal recognition of Wilson's lease to Joiner was also binding upon plaintiffs in error J. W. Smith and R. H. Hedge, who claim under an oil and gas lease thereafter executed by Turner, citing *Havard v. Smith* (Tex. Civ. App.), 13 S. W. (2d) 743." In *Murphy v. Jamison* (Tex. Civ. App.), 117 S. W. (2d) 127, it is said: "We do not review the facts of that case but cite it only to illustrate the conclusive effect given by our Supreme Court to a construction by the parties of a reservation in their chain of title." Citing *Havard v. Smith*, 13 S. W. (2d) 743. To the same effect is *Henderson v. Book et al.* (Tex. Civ. App.), 128 S. W. (2d) 117, writ of error refused by the Supreme Court, in which it is said: "it has been many times held that recitals in deed bind both parties and parties claiming under such deed." Citing *Havard v. Smith*, 13 S. W. (2d) 743. And in the recent case decided by the Supreme Court of Texas, *Greene et al. v. White et al.*, 153 S. W. (2d) 575, it is said: "It is held that the recital of one deed in another binds the parties to the deed containing the recital, and those who claim under them, and may take the place of a deed and thus form a muniment of title." Citing *Havard v. Smith*, 13 S. W. (2d) 743.

We could cite many more cases.

It will be seen that all of the recitals under consideration by the court in the foregoing cases were subsequent to the execution of the instruments which they interpreted, and the plaintiff was not shown to have relied on them. Respondents say that the recitals contained in their deeds are subsequent to the date of petitioner's deed and that petitioner is not shown to have relied thereon. As is well known, that principle refers to equitable estoppel or estoppel in pais, and not to estoppel by deed. It has uniformly been held in Texas that recitals in deeds subsequent are binding on the parties as an interpretation of prior deeds. That is the law laid down by all of the foregoing decisions beginning with *Havard v. Smith*, and we even find it in an early case by the Texas Supreme Court in 1849, *Hardy and Others v. De Leon*, 5 Tex. 211, in which the court says: "If a defendant has acknowledged the title of plaintiff, he cannot afterwards dispute it. Where there are several parties to the record on the same side, the admissions of one will be taken as the admissions of all where there is a joint interest or privity of design between them. A recital of one deed in another binds the parties and those who claim under them *by matters subsequent.*" (Italics ours.)

Thus, it is obvious that the recitals contained in the *Christian* deeds to respondents (R. 360, 363, 367 and 370), all of which describe the *south* line (R. 2) of the *Christian* as the *north* line of the *Snoddy*, are binding on respondents. They plainly show the interpretation and understanding given by petitioner's grantor and all of the respondents, which recitals respondents have accepted and relied on as to where the *south* line of the *Christian* tract is. Respondents

introduced these deeds in evidence *for all purposes.* They claim under them. They are bound by them. Both titles were introduced and both are before the court. Both are found by the lower court and both were found by the Circuit Court of Appeals. One simply supplements the other and respondents claim under both, *exactly as in the McBride case.*

Respondents say that the facts in the present case are distinguishable from the facts in the case of *McBride v. Loomis* (Tex. Sup. Ct.), 212 S. W. 480, because the court held in that case that "the quit-claim deed from the Howard heirs did not constitute the acquisition of a new and independent title, but merely supplemented the title theretofore held and claimed by him under Howard, the common source."

In the *McBride v. Loomis* case, one Charles H. Howard owned the title to a tract of land in El Paso County, Texas, in 1874, and in 1877 died intestate. During the years 1875, 1876 and 1877, Charles H. Howard agreed in writing to make a deed to the land to one John McBride, who fully paid for the land by the delivery of certain wagons, horses, etc., but Charles Howard died without having made the deed. One Charles Kerber was appointed administrator of the estate of Charles H. Howard, and was also appointed temporary administrator of the estate of John McBride. Charles Kerber in 1881, as administrator of the estate of Charles H. Howard and as temporary administrator of the estate of John McBride, made a deed to the land to John C. Ford. The probate proceedings authorizing the deed, as well as the deed itself, contained a recital as follows:

> "And it appearing further that said Charles H. Howard during his lifetime at various times in the

years 1875, 1876 and 1877, agreed in writing to make deeds to John E. McBride for certain parcels of land in the Cuadrilla in El Paso County, Tex., and that said John E. McBride fully paid for said lands according to the terms of said agreement, and that said Charles H. Howard departed this life December 18, 1877, without making deeds to said land to the said McBride in accordance with such agreement."

Ford's title came into the hands of A. M. Loomis, the defendant in this case. The heirs of McBride brought suit in trespass to try title against Loomis for the land. The case was tried in the District Court of El Paso. It was shown that John McBride did not die until August 21, 1909. Therefore, when Kerber assumed to act as temporary administrator of his estate in 1881 under orders of the probate court, he was administering the estate of a living man. Therefore, the proceedings and the deed were void as far as passing any title out of John McBride was concerned. The heirs of McBride had no character of written instrument other than the bare recital in the defendant's deed to John C. Ford and the probate proceedings authorizing such deed produced by the defendant in support of title. Only the paper title, of course, remained in Charles H. Howard who had passed to Ford under the Kerber deed whatever title he had. The heirs of McBride claimed the benefit of the recital above mentioned in the defendant Kerber's deed to Ford. Under the Ford deed, of course, John McBride was common source, as Arthur Christian is in our case, but Loomis also, just as was done in this case, obtained a quit-claim from the heirs of Charles Howard. Loomis introduced his deed to Ford and, also, his quit-claim from the Howard heirs. The District Court, as the

trial court did in our case, held since the McBride heirs had no written instrument but relied only on the recital in Loomis' deed from Kerber, the administrator, to Ford above mentioned, that said recital could not be relied on to prove their title, because Loomis also had the Howard paper or legal title by quit-claim from the Howard heirs. If the McBride heirs could not use the recitals in the defendant Kerber's deed to Ford and the proceedings in the probate court authorizing said deed, there was, of course, no way to show that the title had gone out of Charles H. Howard and the quit-claim deed from the Howard heirs would convey good title, while if plaintiff could use the recitals in the defendant's deeds, of course the equitable title had passed out of Howard and into John McBride, so the quit-claim would not convey anything, because the Howard heirs had nothing left to convey.

The decision of the District Court was affirmed by the El Paso Court of Civil Appeals in *McBride et al. v. Loomis*, 170 S. W. 825, as the Circuit Court of Appeals has done in our case. The plaintiffs then appealed to the Supreme Court, the decision being the same quoted by petitioner in its petition and brief, *McBride et al. v. Loomis* (Tex. Sup. Ct.), 212 S. W. 480, in which the court in reversing the decision of the District Court and the Court of Civil Appeals said:

> "The deed from the administrator of the Howard estate to Ford was introduced without qualification or limitation by defendant. Were the recitals of this deed evidence as against the defendant of the facts recited?
>
> "Defendant concedes that, if the recitals were in a deed constituting a link in a chain of title under which he claimed, such recitals would be admissible against

him. He seeks to avoid their effect by repudiating any claim thereunder and by denial that he was either a party or privy thereto, basing his title upon the quit-claim from the Howard heirs, a separate and distinct title.

"Defendant claimed title under the administrator's deed. He testified that he went into possession of and occupied the land in January, 1906, shortly after the execution of the deed to him under the Ford chain of title, and prior to the execution of the deed from the Howard heirs. His claim of title and possession were referable exclusively to his deed under the Ford title of which the deed in question formed a link. Defendant's predecessors in title were in possession and assert the Howard title through McBride many years prior to the execution of the quit-claim from the Howard heirs. Nor is there evidence of a repudiation of claim under this deed to the date of and during the trial of this cause. In so far as the record discloses, the deed constituted one of the links in a chain of title upon which he relied. There was no admission in the trial court by defendant that the administrator's deed was invalid; such admission being made only on appeal. The deed being thus relied on by defendant, and it, together with its recitals, having been introduced by him, the recitals were available to plaintiffs in the establishment of their title."

* * * * *

"In our view of the case, the introduction by defendant *without qualification or limitation* of the deed from the administrator of the Howard estate to Ford, together with the probate order upon which same was based, esablished that McBride acquired from Howard the equitable title to the land, and there passed to the heirs of Howard the bare legal title, which is subordinate to the title which thus vested in McBride.

> The deeds to Ford from the administrators of the estates of McBride and Howard being void and conveying no title, it follows that, if McBride was the common source, plaintiffs claiming through McBride, holding the equitable title, and defendant under the quit-claim deed from the Howard heirs, holding only the bare legal title, plaintiffs have established the superior title to the land." (Italics ours.)

Again referring to the statement made by respondents in their brief at the bottom of Page 10 and the top of Page 11 that the instant case is distinguishable from the case of *McBride v. Loomis* because the court in the *McBride* case held that the quit-claim deed from the Howard heirs to defendant "did not constitute the acquisition of a new and independent title." The reason that the court held the quit-claim was not a new and independent title was because the recitals in the administrator's deed from Kerber, administrator of Howard, to Ford showed by a recital therein that John McBride had paid the purchase price of the land, although no deed had ever issued to him. Since the plaintiffs, the McBride heirs, were given the benefit of the recital in the defendant's deed, the equitable title had gone out of Charles Howard. Therefore, the heirs of Charles Howard had nothing to convey when they executed and delivered their quit-claim to the defendant Loomis. Therefore, when Loomis, the defendant, obtained the quit-claim it "did not constitute the acquisition of a new and independent title."

The circumstances are the same in the instant case. If petitioner is given the benefit of the recitals in respondents' deeds, it is proved as a matter of law that the dividing line between the Christian and Snoddy tract is the line alleged in petitioner's complaint and alleged in respondents'

pleadings, and definitely and positively recited in all of respondents' deeds, quit-claims, and other instruments under Christian, as well as under Snoddy. The result is that the Snoddy title does not constitute "a new and independent title" because the instruments evidencing such title attempt to convey land already conveyed to petitioner by Arthur Christian prior to the conveyances to respondents and entirely outside of the Snoddy tract and north of Snoddy's north fence and outside and within the Christian tract already owned by petitioner by virtue of the original lease executed by Christian April 28, 1930, petitioner's Exhibit 9. (R. 340.) Respondents did not receive any land under a conveyance five years after Christian had already conveyed the land, when on December 22, 1935 and after oil wells had been drilled in every direction, Arthur Christian signed an attempted lease to Beavers, defendant's Exhibit 19. (R. 360.) Said attempted lease did not and could not convey anything because the same land had already been conveyed under the prior lease, and since it was already conveyed and was north of Snoddy's *north* fence, the quit-claims and other instruments from Snoddy did not constitute "a new and independent title" because they did not convey anything. They show by their very terms that they attempt to convey land entirely outside the Snoddy tract and land Snoddy never did own, and north of his north fence.

All the authorities, particularly *McBride v. Loomis* and *Havard v. Smith* (which is the leading Texas case on estoppel by deed), make it clearly evident that the fact that the recitals in respondents' deeds were made after petitioner acquired its title, or that petitioner did not rely upon them,

or that they were not made for its benefit, has nothing whatever to do with *estoppel by deed.* Respondents' arguments as to these recitals being subsequent and that petitioner did not rely upon them, and that they were not made for petitioner's benefit, apply only to *equitable estoppel* or estoppel in pais and not to *recitals in deeds.*

Since respondents introduced both the Christian and Snoddy instruments in evidence *for all purposes,* relied upon them and obtained their purported title under Christian, this case is on all fours with *McBride v. Loomis,* supra; and the exact legal question is before the court in this case that was before the Supreme Court of Texas in the *McBride* case; and the decision of the Circuit Court of Appeals below is squarely in conflict with the local law of Texas as enunciated in *McBride v. Loomis.*

II.

REPLY TO ESTOPPEL AGAINST PETITIONER ON ACCOUNT OF DRILLING THREE WELLS AS OFFSETS

Section 2 of respondents' argument beginning at the top of Page 12 of its brief is devoted to its contention that the holding of the lower court that petitioner had lost its land by estoppel because it did not set up its title before the Railroad Commission and was silent while the respondents drilled three wells, having in the meantime drilled three of its eleven wells as offsets to the three wells drilled by respondents, was not in conflict with local Texas law.

In support of their contention respondents cite several cases, none of which are in point. In the case of *Guest v.*

Guest, 12 S. W. 831, the plaintiff not only bid in the land at executor's sale for the defendant's father and expressly advised the defendant to go on the land and take possession of it and make valuable improvements on it, but the defendant held it for 10 years, which is the time required in Texas for the maturity of the Statute of Limitation giving the one in possession absolute title.

In *South Penn. Oil Co. v. Calif. Creek Oil & Gas Co.*, 140 F. 507, the plaintiff not only actively participated in the improvement but accepted royalty from the very lease he later tried to set aside.

In *Luling Oil & Gas Co. v. Magnolia Petroleum Co.*, 135 S. W. (2d) 738, it is judicial estoppel and not estoppel in pais that is the subject of the opinion.

In *Loper v. Meshaw Lumber Co.*, 104 S. W. (2d) 597, the plaintiff was not only present *while the title was being conveyed* to the defendant, but actively participated therein, and the defendant was expressly acting for his benefit in so doing as will be seen by examining the opinion.

Certainly silence does not constitute estoppel, and has been often so held in Texas.

Williams v. Conger (Tex. Sup. Ct.), 49 Tex. 602;
Horst v. Herring (Tex. Sup. Ct.), 8 S. W. 306;
Decker v. Rucker (C. C. A.), 202 S. W. 1001, error refused.

Certainly the drilling of offsets on its land could not constitute estoppel when necessary to comply with legal obligations.

Respondents claim less than one acre of ground, while petitioner had approximately 30 acres on which it drilled only 11 wells while respondents drilled 3 wells on the acre. Petitioner not only had a legal right to drill its wells but was under an obligation to its lessor to do so. 31 *Tex. Jur.*, 822, Sec. 179.

The only remaining element of alleged estoppel is petitioner's failure to urge title before the Texas State Railroad Commission. That question has been set at rest by the case of *Magnolia Petroleum Co. v. Railroad Commission et al.* (Tex. Sup. Ct.), 170 S. W. (2d) 189. Since it has been held by the Texas Supreme Court that the question of whether or not the issue of title was raised before the Railroad Commission was not even admissible evidence in a subsequent suit for title of the land, to hold that such failure constitutes estoppel or even is an element of estoppel is plainly in conflict with local state law as declared by the Supreme Court of Texas in the *Magnolia* case and the opinion of the Circuit Court of Appeals is squarely in conflict therewith.

III.

DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS CALLING FOR EXERCISE OF SUPERVISORY POWER BY THIS COURT

Respondents contend that the judgment is a mere clerical error and that petitioner did not separately claim the land and besides it is not worth anything.

By referring to the map in the appendix at the back of petitioner's petition and brief, it will be seen that there

is more than half of the entire tract north of the line found by the court. Since the tract contains two acres, there is more than an acre north of the line found in the fact findings (No. 12, R. 509).

This Court knows that the East Texas oil field is one of the most productive, if not the most productive, in the world. The land in dispute is more than an acre in the heart, generally known as the fairway, of the East Texas oil field. The trial court said at the trial: "We are figuring this East Texas real estate like they do in New York City." (R. 79.) This Court knows judicially that each acre, irrespective of whether or not it has been drilled, has tremendous value. To show the tremendous value, the respondents have drilled and are now operating three wells on less than one acre. To say that a tract of land such as this in the heart of the East Texas oil field is valueless and the wrongful taking of more than an acre of our land is harmless error is quite remarkable to say the least.

It is, of course, unnecessary that the value be separately shown. The suit was not brought separately for the tract. It is a Texas trespass to try title suit to determine boundary. The only question in the suit is the location of the boundary. Petitioner is entitled as a matter of right to any land north of the boundary determined by the court. By the very nature of the suit, petitioner does separately contend for any land not determined to be within respondents' boundary.

Respondents quote Rule 60, Subdivision (a), Federal Rules of Civil Procedure, providing for correction of clerical mistake in orders, judgment, etc., saying that petitioner made no such motion. However, respondents do not say

that petitioner should have filed such motion as a prerequisite to its right to raise this question on appeal. It is evident that Rule 60 is for the purpose of saving the expense of an appeal to correct those cases in which there is a mere clerical error or mistake in a judgment or other order without the expense of an appeal, but it certainly does not place on the losing party the burden of determining which errors might be said to be clerical with the requirement that as to those errors a motion must be first filed as a prerequisite to appeal as to them.

That conclusion is contrary to the very spirit of the rules. Rule 48 providing that exceptions are unnecessary "and if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him." It was held in *Stoltz v. U. S.* (9th Cir.), 99 Fed. (2d) 283, that an appeal from a judgment in unlawful detainer action would be decided on the merits notwithstanding that no question was raised as to admissibility of evidence and that there was no request for special findings and that there were no exceptions. Many similar decisions could be cited. Rule 52, Subdivision (a) expressly provides: "Requests for findings are not necessary for purposes of review", and it has been held that suggested findings filed by the unsuccessful party would not avail him anything and are not even properly a part of the record on appeal, but that he should take his objection by way of appropriate assignments of error on appeal. No request for judgment is necessary and no motion for a new trial is necessary, and that is certainly so where it is felt to be purely a waste of time of the attorneys as well as the

court, and the attorneys feel certain that it will be overruled.

Petitioner has never made any contention except that the old hedge fence was the line. As pointed out in petitioner's brief, during the twenty-one months that this case was held under advisement by the trial court, at least three written briefs were presented and the case was orally argued, and the petitioner's attorneys thought that no further argument would do any good.

The respondents now admit that the line fixed by the judgment was error. They agree that the purpose of the suit was to determine the boundary. The judgment fixes the boundary at the Beaver's line. By referring to the map in the appendix at the back of petitioner's brief, it will be seen that the pleadings of both petitioner and respondents and all of respondents' instruments describe the old hedge fence as the *north* boundary line of the *Snoddy* tract. Yet the trial court found that a line beginning 10 feet south of the northeast corner of the tract running diagonally east across the tract to the southeast corner was the line. *Then the trial court rendered judgment that still another line, the Beaver's line,* is the north line of the Thad Snoddy 50-acre tract, although nobody in this suit had claimed it to be the line, and respondents now admit that it is error. Respondents agree that the purpose of the suit was to determine the line and now admit that the wrong line has been determined. Certainly a line has been determined that nobody in this suit claims is the line, and, since it is an admitted error, it should be corrected.

CONCLUSION

WHEREFORE, petitioner prays that said writ of certiorari be granted.

Respectfully submitted,

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